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### Tenancies-at-will

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## Tenancies-at-will: *Allen v McTaggart*

*Allen v McTaggart*<sup>1</sup> is the first decision of the Inner House of the Court of Session on the requirements for tenancies-at-will under the Land Registration (Scotland) Act 1979. For that reason alone it is of significance. In *Allen* the court had to decide whether eight huts at Rascarrel Bay, Dumfries-shire were occupied by tenants-at-will. Six of the hut-dwellers had appealed from the Lands Tribunal for Scotland to the Inner House of the Court of Session.<sup>2</sup> They sought to take advantage of the entitlement of tenants-at-will to acquire their landlord's interest in terms of section 20(1) of the 1979 Act. In turn, the landlords (the McTaggarts) argued that the hut-dwellers were not tenants-at-will but conventional tenants, their tenure subsisting on the basis of informal leases from year to year.

### A. THE TENANCY-AT-WILL

In *Allen v McTaggart*, Lord Nimmo Smith remarked that no mention of tenancies-at-will is to be found in the work of the institutional writers and that it is "likely that they... [are]... synonymous with rental-rights".<sup>3</sup> This suggestion is encountered in a number of sources.<sup>4</sup> It may be correct, since the informal nature of the tenancy-at-will certainly resembles the historic rental right.<sup>5</sup> There is no discussion of tenancy-at-will in any legal writing prior to a Select Committee Report of 1894.<sup>6</sup> This may indicate that the tenancy-at-will evolved incrementally over time from the remaining vestiges of rental rights. However, while this may seem logical, it is no more than speculation, since there is no concrete historical evidence in the primary sources to support it.

From the case law, it is clear that the statutory characteristics of tenancies-at-will contained in the 1979 Act are simply basic requirements and that others must also be present. Section 20(8) of the 1979 Act defines a "tenant-at-will" as a person who is the actual or constructive occupier<sup>7</sup> of a building or buildings erected on land by virtue of "custom and usage". That person must not be a tenant or occupier under (i) a lease or (ii) an enactment, and in addition the land must have a building erected upon it which has been acquired for value by that person or his predecessors in occupancy.

1 [2007] CSIH 24, 2007 SLT 387. The court, an Extra Division, comprised Lords Nimmo Smith, Kingarth and Marnoch. The opinion of the court was given by Lord Nimmo Smith.

2 The decision of the Lands Tribunal is reported as *Harbinson v McTaggart* 2006 SLT (Lands Tr) 42.

3 2007 SLT 387 at para 8.

4 *Report of the Scottish Leases Committee* (Cmd 8656: 1952) paras 78-79; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) 69; Scottish Law Commission, *Report on the Abolition of the Feudal System* (Scot Law Com No 168 (1999), available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) para 8.12 n 43.

5 The rental right is referred to as an absolute tenancy-at-will in M Sanderson, *Scottish Rural Society in the Sixteenth Century* (1982) 58.

6 *Report* from the Select Committee appointed on 23 March 1893 to inquire into the working of the Law of Scotland relating to feus and leases for building including the casualties payable to the superior, and the conditions frequently inserted in feu charters and leases for building (26 July 1894).

7 *Ferguson v Gibbs* 1987 SLT (Lands Tr) 32 at 33.

The occupier's right of occupancy must be of an indefinite duration and he or she must be under an obligation to pay a ground rent to the landowner in respect of the land, excluding the building upon it.

From the statutory definition above, it can be gleaned that the tenancy-at-will is an informal type of holding, established by custom and usage, where a person has the right to remain in occupation of a building on an indefinite basis in return for the payment of a ground rent. Beyond that, there is no further elaboration of the characteristic elements of tenancy-at-will in the 1979 Act. A more complete picture of this lease-like device and its creation requires examination of case law and secondary sources.

The institution may be seen to perform a social function in communities where tenants are unable to afford legal advice and formal conveyancing procedures. As Lord Nimmo Smith explained in *Allen v McTaggart*:<sup>8</sup>

Tenancies-at-will... tend to have been established in places where there has been a pressing social need for housing adjacent to a place of work (such as fishing or mining), where the residents have required security of tenure for themselves and their families but have been unable to afford the expense of formal conveyancing, and where landlords have been trusted to provide security of tenure in accordance with informal, but well-recognised, conventions.

A number of secondary sources substantiate this analysis and provide supplementary details of the nature of tenancy-at-will.<sup>9</sup> Arguably, these sources are relevant to amplify the position provided for in the Act. Thus, although a tenant-at-will obtains no formal title to the land, a landlord may issue an informal acknowledgement of the position. Moreover, the practice is to enter the beneficiary of a deceased tenant-at-will as the new tenant-at-will in the rental or estate book of the landowner. If a tenant-at-will fails to pay the ground rent, the landowner has the right to sell the building in order to meet the arrears. Significantly, the tenant-at-will is entitled to transfer the right of occupancy of the building. This is effected, not by assignation or conveyance, but informally by the seller submitting a simple receipt to the purchaser, followed by intimation of the transfer to the landowner, who will commonly then record the new tenant-at-will's name and details in the rental or estate book.

Relatively rare, the tenure is often described as precarious. The tenant-at-will occupies on the basis of an unregistered title – with no scope for a standard security – and is unable to compel delivery of a title; the landlord can oust the tenant for non-payment of the ground rent and dispose of the building to meet arrears. It is unlikely that a tenant-at-will enjoys real rights effectual against a landlord's singular successors given the absence of any registered title or documentation establishing the tenant-at-will's tenure in a public register.<sup>10</sup>

<sup>8</sup> 2007 SLT 387 at para 15.

<sup>9</sup> Report from the Select Committee (n 6) ix-x; *The Scottish Liberal Land Enquiry Committee: Scottish Land, Rural and Urban* (London, 1914); *Report of the Royal Commission on the Housing of the Industrial Population of Scotland Rural and Urban* (Cd 8731: 1917) paras 1518, 1620-1629; *Report of the Scottish Leases Committee* (n 4) paras 70-81; Scottish Law Commission, *Report on the Abolition of the Feudal System* (n 4) para 8.12.

<sup>10</sup> See 2007 SLT 387 at para 9. The Leases Act 1449 does not apply to tenancies-at-will.

What emerges from the case law is that the statutory requirements of the 1979 Act are best viewed as basic ingredients. Additional requirements must also be satisfied and, if not present, the person claiming the existence of a tenancy-at-will will be unsuccessful. But what are these further non-statutory factors? In cases prior to *Allen v McTaggart*, the courts struggled to identify them, there appearing to be an absence of overarching principles from which they could be derived. For example, in *McCann v Anderson*,<sup>11</sup> it was held that the buildings erected on the land must be “permanent” and “substantial”; timber garage structures built on a gap site which were prefabricated and removable did not meet this standard. In the absence of any mention in the 1979 Act of a building having to be “permanent”, the Lands Tribunal sought to justify this requirement by reference to (i) the mischief which Parliament intended the Act to remedy (i.e. to assist and protect persons who had built some permanent and substantial structure on ground belonging to another), and (ii) the general law of fixtures (i.e. that a removable fixture such as a prefabricated structure could be severed by the tenant and so could not be a “building”).

### B. ALLEN v MCTAGGART

*Allen v McTaggart* seeks to meet the problem of the relatively unarticulated position of tenancy-at-will. The Inner House took the view that the ground rent must be static over the period of the tenancy, and that any increase or decrease would be fatal.<sup>12</sup> It is not altogether clear on what principle such a rule is posited. The court referred to *Conochie v Watt*<sup>13</sup> but failed to explain why it is impossible for a tenancy-at-will to be constituted on the basis of a fluctuating ground rent established by custom and usage. The Inner House also stressed the importance of proving that the necessary custom and usage – a statutory criterion<sup>14</sup> – had become established in the locality.<sup>15</sup> Consistent with the view of the Lands Tribunal in *Ferguson v Gibbs*,<sup>16</sup> and contrary to that expressed by the Tribunal in *Conochie v Watt*, the Inner House held that it is not necessary to demonstrate that custom and usage has existed from time immemorial or even for a very long time.<sup>17</sup> Instead, a custom in the locality for the existence of this form of tenure is the key factor which must be demonstrated. In fact, there were only a few scattered instances of such tenancies throughout the country, and the court treated with scepticism the “claim that tenancies-at-will had come into existence on the Solway coast as recently as the twentieth century”.<sup>18</sup> In the absence of persuasive

11 1981 SLT (Lands Tr) 13 esp at 15.

12 2007 SLT 387 at para 21.

13 Lands Tribunal, 7 September 1993 (referred to by Lord Nimmo Smith at para 13).

14 Land Registration (Scotland) Act 1979 s 20(8)(a).

15 Para 21.

16 1987 SLT (Lands Tr) 32

17 In *McCann v Anderson* 1981 SLT (Lands Tr) 13 at 16, the Lands Tribunal doubted whether the period of 30 years was sufficient to establish “custom and usage”, while in *Ferguson v Gibbs* 1987 SLT (Lands Tr) 32 a period of over 60 years was deemed to be sufficient.

18 Para 15. According to the *Report of the Royal Commission on Housing* (n 9) paras 1621-1625 and 1627-1629, areas where tenancies-at-will are recognised to exist as a matter of custom and usage are the fishing villages of Cairnbulg and Inverallochy in Aberdeenshire, Gardenstown and the Seafeld Estates in Banffshire, Avoch, the Rosehaugh Estate and Hilton in Ross-shire, and Embo, Golspie, Brora and

evidence as to custom and usage, the hut-dwellers' claim that they were tenants-at-will was rejected.<sup>19</sup>

### C. CONCLUSION

Given the informal nature of the tenancy-at-will, it is possible that it represents a modern form of Crown rental right which genetically modified over time in certain distinct localities. However, rigorous historical research would be needed to test such a hypothesis. The true origins of this modern form of tenure, and what attributes (if any) of rental rights have evolved over time to contribute to its genetic DNA, are worthy of exploration. This may prove to be of utility in guiding the courts in future cases towards the identification of the key non-statutory criteria which must be present in order to establish a tenancy-at-will.

However, a note of caution should be struck. Historical research may reveal that the link between rental rights and the modern tenancy-at-will is tenuous at best. Three basic, yet crucial, differences between rental rights and tenancies-at-will can be identified. First, writing was required for a kindly tenancy, but is not required to constitute a tenancy-at-will. Secondly, a tenancy-at-will is assignable whereas kindly tenancies (with the exception of the kindly tenancies of the Four Towns of Lochmaben) were not so assignable. Finally, and perhaps most importantly, rental rights conferred real rights in favour of a kindly tenant, whereas the tenancy-at-will does not appear to do so. Thus, if future research were to reveal a clear historical nexus between rental rights and tenancies-at-will, how these important differences came to be forged over time would equally require to be explained.

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Helmsdale in Sutherlandshire. To these may be added Leadhills in Lanarkshire: see Paton & Cameron, *Landlord and Tenant* (n 4) 69.

<sup>19</sup> The claim had previously been rejected by the Lands Tribunal: see *Harbinson v McTaggart* 2006 SLT (Lands Tr) 42.